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(3)

No. 08-965

FILED
MAR 17 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

METROPOLITAN GOVERNMENT
OF NASHVILLE & DAVIDSON COUNTY,

Petitioner,

v.

BRIAN PETTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

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Brian Petty's defense of the United States Court of Appeals for the Sixth Circuit's decision is based upon a misreading of the Court of Appeals' opinion and a misinterpretation of the Uniform Services Employment and Reemployment Act ("USERRA"), 38 U.S.C. §§ 4301-4334. USERRA does not prohibit employers from considering whether a returning veteran is qualified for a particular position. To the contrary, Section 4313(a) of USERRA dictates that an employer's obligation to reemploy a veteran in a particular position is contingent upon the veteran being "qualified" for the position. Nevertheless, the Sixth Circuit has foreclosed any meaningful review of returning veterans' qualifications by prohibiting any inquiry into veterans' qualifications.

Respectfully, the Court of Appeals erred in its interpretation of USERRA, and its decision has the potential to endanger the public. For these reasons, and as discussed in more detail below, the Metropolitan Government respectfully requests plenary review of this matter.

I. The Sixth Circuit's Decision is Inconsistent with the Text of USERRA, and it has the Potential to Endanger the Public

In its initial brief, the Metropolitan Government stated that "the Sixth Circuit held that USERRA prohibits employers from taking steps to determine whether returning veterans are 'qualified' to resume their jobs . . . ." Petition for Writ of Certiorari, p. 23. In his Opposition, Petty states that "[t]he Court will struggle in vain to locate such a holding it the opinion."

Petty's Opposition, p. 11. As set forth below, however, there is no other way to read the Sixth Circuit's opinion. Without question, the Sixth Circuit held that USERRA prohibits employers – even employers in safety-sensitive fields like local law enforcement – from taking steps to ensure that returning veterans are qualified to resume their jobs.

A. Contrary to the Sixth Circuit's Decision, USERRA Does Not Prohibit Employers from Considering Whether Returning Veterans Are Qualified for Reemployment

Throughout this case, the Metropolitan Government has argued that the Police Department not only has a right, but an obligation, to ensure that its officers are physically, mentally, and temperamentally fit for duty. The Sixth Circuit summarily dismissed this argument, stating:

> It is of no consequence here that Metro believes it is obligated to "ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officer is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department." In USERRA, Congress clearly expressed its view that a returning veteran's reemployment rights take precedence over such concerns.

Petty v. Metropolitan Government, 538 F.3d 431, 441 (6th Cir. 2008). The Sixth Circuit then held that, notwithstanding the Police Department's perceived

obligation to ensure that returning veterans are still qualified, Petty was entitled to be reemployed as a police sergeant because he satisfied the prerequisites set forth in 38 U.S.C. § 4312. *Id.* at 443. Specifically, the Court stated:

> At the point at which Petty was entitled to reemployment under §§ 4312 and 4313, Metro had no basis on which to question his qualifications. Petty had satisfied the only prerequisites to § 4313 — those specified in § 4312 — and Metro's attempt to impose additional prerequisites through its return-to-work process was, as we have already explained, wholly impermissible.

Id.

In sum, the Sixth Circuit held that Petty was entitled to be reemployed as a patrol sergeant because he satisfied the prerequisites "specified in § 4312." *Petty*, 538 F.3d at 443. To clarify, the prerequisites "specified in § 4312" are: (1) giving advance notice of military leave; (2) having cumulative military leave of less than five years; (3) applying for reemployment within the specified time period; and (4) receiving a separation from service under "honorable conditions." *Petty*, 538 F.3d at 440-41. The Court of Appeals held that, because Petty provided these four pieces of information, the Police Department "had no basis on which to question his qualifications." *Id.* at 443.

This conclusion illustrates the fundamental disagreement between the parties, and the fundamental inconsistency between the Sixth Circuit's decision and the text of USERRA. Petty argued, and the Sixth Circuit held, that Section 4312 outlines the exclusive "return-to-work process" under USERRA: A returning veteran is only obligated to provide the four pieces of information identified in Section 4312, and employers are prohibited from requesting any additional information. *See* Petty's Opposition, pp. 11-12. The Metropolitan Government, on the other hand, submits that, while a returning veteran who provides the information identified in Section 4312 is entitled to "the reemployment rights and benefits" of USERRA, the analysis does not end there. To the contrary, the next section, Section 4313, dictates the specific "reemployment rights and benefits" to which a returning veteran is entitled. And under Section 4313, an employer's obligation to reemploy a veteran is contingent upon the veteran being "qualified" for the position. *See* 38 U.S.C. § 4313(a).

Nevertheless, the Court of Appeals held that "the only prerequisites to § 4313" are "those specified in § 4312." *Petty*, 538 F.3d at 443. Moreover, the Court held that the Police Department's return-to-work process "is superceded by USERRA's reemployment provisions." *Id.* at 442. In support of this conclusion, the Court cited 38 U.S.C. § 4302(b), which states that USERRA "supercedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the

receipt of any such benefit." 38 U.S.C. § 4302(b). The Court concluded that the Police Department's return-to-work procedures constitute "additional prerequisites," and thus, are superceded, because they are "in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights." *Petty*, 538 F.3d at 442.

The flaw in the Sixth Circuit's analysis is that it conflates (1) whether a returning veteran is "entitled to the reemployment rights and benefits" of USERRA under Section 4312, and (2) whether a returning veteran is "qualified" for a particular position under Section 4313. These are distinct concepts governed by different sections of USERRA. Yet the Sixth Circuit held that the only prerequisites to reemployment are "those specified in § 4312." The inescapable result of this holding is that any inquiry into a returning veteran's "ability to perform the essential tasks of [a] position" is preempted by Section 4302(b) because it is in addition to the prerequisites to reemployment "specified in § 4312." *Petty*, 538 F.3d at 442-43.

The Sixth Circuit departed from the plain text of USERRA and rendered the "qualification" language in Section 4313(a) superfluous.[1] Moreover, despite Petty's

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1. The Sixth Circuit also cited 38 U.S.C. § 4315 for the proposition that federal intelligence agencies, and only federal intelligence agencies, may evaluate returning veterans' qualifications. *Petty*, 538 F.3d at 442. Section 4315 does not establish that only federal intelligence agencies may evaluate returning veterans' qualifications; it establishes that federal intelligence agencies, unlike other employers, "shall not be subject to judicial review" based upon their reemployment decisions. 38 U.S.C. § 4315(c)(3).

protestations to the contrary, the Sixth Circuit's decision has broad implications for all employers. Employers – even employers in safety-sensitive fields like local law enforcement – are now prohibited from ensuring that returning veterans are still qualified for their positions, regardless of any threat to the veteran, his or her co-workers, or the public. Local law enforcement agencies are precluded from satisfying their constitutional obligation to ensure that the officers they put on the street are qualified. *See, e.g., Bd. of County Comm'ns of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 411 (1997) (holding that a government official's failure to scrutinize an applicant's background may give rise to liability under 42 U.S.C. § 1983); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671 (1989) ("[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."); *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (holding that a police department's failure to train or supervise officers may subject a municipality to liability under 42 U.S.C. § 1983); and *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999) (holding that a police department's failure to discipline for perjury may give rise to a cause of action under 42 U.S.C. § 1983). And the Sixth Circuit's holding goes far beyond law enforcement. Under the Sixth Circuit's analysis, any returning veteran must be put back to work if he or she provides the four pieces of information identified in Section 4312.

Respectfully, the Court of Appeals erred in its interpretation of USERRA, and its decision has the potential to endanger the public. For these reasons, the Metropolitan Government respectfully requests plenary review of this matter.

B. By Prohibiting any Inquiry into Returning Veterans' Qualifications, the Sixth Circuit has Foreclosed any Meaningful Review of Veterans' Qualifications

Recognizing that "qualification" is an essential component of the analysis under Section 4313, Petty is left to argue that, while the Sixth Circuit's decision prohibits employers from inquiring as to returning veterans' qualifications, it does not prohibit employers from considering whether returning veterans are qualified. Petty characterizes the Sixth Circuit's decision as follows: "Under the Sixth Circuit's decision, employers have the right to consider veterans' qualifications for a particular position. However, they cannot implement a return-to-work process that directly conflicts with the one outlined in USERRA." Petty's Opposition, p. 13.

To clarify, what Petty refers to as the "return-to-work process . . . outlined in USERRA" is nothing more than the veteran's obligation to provide the four pieces of information identified in Section 4312. Thus, what Petty is saying is that, while employers may consider returning veterans' qualifications, they may only do so insofar as returning veterans' qualifications, or lack thereof, are apparent from an examination of the four pieces of information identified in Section 4312. The problem with this analysis, however, is that an employer cannot divine whether a returning veteran is qualified for a particular position. For the qualification language in Section 4313(a) to serve any purpose, employers must be permitted to inquire as to returning veterans' qualifications.

Petty states that the qualification language in Section 4313 was "primarily intended to deal with employees who return to technologically-advanced situations for which they cannot qualify . . . ." Petty's Opposition, p. 8 (citations omitted). Even this characterization contemplates inquiry into a returning veteran's qualifications in "technologically advanced situations." But that is not what the Sixth Circuit held. The Sixth Circuit held that *any* return-to-work process – other than requesting the four pieces of information identified in Section 4312 – is unlawful. *Petty*, 538 F.3d at 443.

In its initial brief, the Metropolitan Government cited several articles describing the prevalence of post-traumatic stress and aggressive behavior in returning veterans. *See* Petition for Writ of Certiorari, pp. 24-25. Petty does not suggest that the information the Metropolitan Government cited is incorrect. Instead, he argues that "Metro cannot use the facts of other cases to justify review in this case." Petty's Opposition, p. 13.

Respectfully, how the Sixth Circuit's decision will impact other cases is squarely at issue when this Court determines whether a case merits consideration. In this case, by holding that employers are prohibited from implementing a return-to-work process, the Sixth Circuit has opened the door for psychologically unfit veterans to be returned to service as police officers. Petty argues that if a veteran is left with a psychological disability, "other provisions of USERRA would govern[] his reemployment rights." Petty Opposition, p. 13. While Section 4313(a)(3) outlines the procedure for reemploying veterans with disabilities, Petty's

argument ignores the fact that, absent some type of return-to-work process, employers will not know that a returning veteran has a disability, particularly a psychological disability.

By prohibiting any inquiry into returning veterans' qualifications, the Sixth Circuit has foreclosed any meaningful review of veterans' qualifications. In so doing, the Sixth Circuit departed from the text of USERRA. Because this issue is so important, the Metropolitan Government respectfully requests plenary review of this matter.

II. The Sixth Circuit's Decision Creates a Circuit Split on the Issue of What "Qualified" Means Under USERRA

In its initial brief, the Metropolitan Government argued that, to the extent the Sixth Circuit considered the issue of a returning veteran's "qualifications," it concluded that Petty was "qualified" to serve as a police sergeant because (1) he received a non-disqualifying discharge from the U.S. Army Reserves, and (2) his physical ability to perform the job was not at issue. *See* Petition for Writ of Certiorari, p. 29. Petty argues that "[t]he Sixth Circuit never held, either expressly or impliedly, that a veteran is qualified for a position so long as he can satisfy the physical demands." Petty's Opposition, p. 9. As discussed below, however, to the extent the Sixth Circuit considered the issue of "qualifications" as distinct from the prerequisites "specified in § 4312," it only did so in the context of "physical qualifications."

By way of background, and as set forth above, the Sixth Circuit held that Petty was entitled to be reemployed as a police sergeant because he satisfied the prerequisites set forth in Section 4312. *Petty*, 538 F.3d at 443. Furthermore, the Court held that, because Petty had satisfied the prerequisites set forth in Section 4312, the Metropolitan Government had no basis to question his qualifications. *Id.* To the extent the Sixth Circuit addressed the issue of "qualifications" as distinct from the prerequisites "specified in § 4312," it did so in the context of "physical qualifications," stating:

> Metro does not question Petty's physical qualifications; instead, it questions only whether his conduct during his military service would disqualify him from returning to service in the police department. But Petty's separation from military service is classified as "under honorable conditions," which Congress has made clear suffices to qualify him for USERRA benefits.

Id. at 441.[2]

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2. As discussed in the Metropolitan Government's initial brief, its position in this litigation was, and is, that Petty's *dishonesty* when he returned from military leave renders him unqualified to serve as a police officer. *See* Petition for Writ of Certiorari, p. 30. In fact, the Court of Appeals recognized this point later in its opinion, stating: "Metro argues *only* that it did not violate § 4313 because, perhaps having been *dishonest* in the return-to-work process, Petty may not be qualified to hold these positions." *Petty*, 538 F.3d at 444 (emphasis added).

In light of the Sixth Circuit's conclusion that "Petty was entitled to reemployment under §§ 4312 and 4313" immediately upon satisfying the prerequisites "specified in § 4312," it is being generous to state that the Sixth Circuit acknowledged "physical qualifications" as potentially limiting a returning veteran's right to reemployment. But even if the Sixth Circuit acknowledged "physical qualifications" as potentially limiting a veteran's right to reemployment, its analysis of the "qualification" issue is incomplete. USERRA defines "qualified" as "having the ability to perform the essential tasks of the position." 38 U.S.C. § 4303(9). The Department of Labor's interpretive guidance clarifies that whether a task is essential depends, at least in part, upon the employer's judgment. *See* 20 C.F.R. 1002.198(a)(2). Yet the Sixth Circuit wholly rejected the Police Department's judgment as to what qualifications are essential for police officers. In so doing, the Sixth Circuit departed from the text of USERRA and it created a circuit split on the issue. *See Lapine v. Town of Wellesley*, 304 F.3d 90, 103 (1st Cir. 2002); *Preda v. Nissho Iwai Am. Corp.*, 128 F.3d 789, 792 (2d Cir. 1997).

The Sixth Circuit's decision conflicts with USERRA; it conflicts with the Department of Labor's interpretative guidance; and it conflicts with the First Circuit's decision in *Lapine* and the Second Circuit's decision in *Preda*. Furthermore, the Sixth Circuit's decision has the potential to endanger the public. For these reasons, the Metropolitan Government respectfully requests plenary review of this matter.

III. This Case is in an Ideal Posture for Review by the Supreme Court

Finally, Petty argues that this Court should decline to review this case because the Sixth Circuit's decision does not constitute a final order. *See* Petty's Opposition, pp. 14-17. As noted in Wright & Miller, however, "[i]n a wide range of cases, certiorari has been granted after a court of appeals has disposed of an appeal from a final judgment on terms that require further action in the district court, so that there is no longer any final judgment." 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4036, pp. 29-30 (2d ed. 2008) (collecting cases).

In this case, the Metropolitan Government seeks review of the Sixth Circuit's decision on Petty's reemployment claim. The District Court granted summary judgment for the Metropolitan Government, holding that the Police Department's return-to-work process did not violate USERRA. The Sixth Circuit reversed the entry of summary for the Metropolitan Government and directed entry of summary judgment for Petty, holding that the Police Department's return-to-work process did violate USERRA. *Petty*, 538 F.3d at 441-442. The Sixth Circuit remanded the case to the District Court "with instructions to enter summary judgment in favor of Petty on the reemployment claims and to determine the resultant damages . . . ." *Id.* at 448.

The only thing left for the District Court to do with Petty's reemployment claim is determine the appropriate damages. There is no substantive analysis left. Accordingly, this claim is in an appropriate posture for review.

CONCLUSION

The Sixth Circuit's conclusion that the Metropolitan Police Department is precluded from applying any return-to-work process to returning veterans is inconsistent with the text of USERRA. Furthermore, the Sixth Circuit's interpretation of "qualified," as that term is used in USERRA, is inconsistent with the Department of Labor's regulations interpreting this term and creates a circuit split on the issue.

Congress did not intend for USERRA to elevate a returning veteran's right to reemployment above the public's right to a police force that is mentally, physically, and temperamentally qualified. But that is the status of the law under the Sixth Circuit's decision. Because this case raises exceptionally important issues, the Metropolitan Government respectfully requests that this Court grant plenary review of this matter.

Respectfully submitted,

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